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No. 98-1359

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

LYNDEN AIR FREIGHT, INC.,
Petitioner,
v.
DIRECTOR OF TAXATION, STATE OF HAWAII,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii

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BRIEF AS *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

This brief is submitted by the Air Transport Association of America, Inc. as *amicus curiae* in support of the petitioner in the above-captioned matter. Written consents of the petitioner and respondent have been obtained and filed with the Clerk of the Court.[1]

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[1] Pursuant to S. Ct. Rule 37.6, *amicus* states that no party to this case had any role in drafting this brief; nor did any person or entity other than *amicus* and its members provide any monetary support for its preparation or filing.

INTEREST OF *AMICUS CURIAE*

The Air Transport Association of America, Inc. (the "ATA") is an association of 23 U.S. and 5 foreign air cargo and passenger airlines, which was founded in 1936.[2] The ATA's various members operate within the United States and in virtually every state of the Union, and account for more than 97% of the domestic passenger and cargo traffic flown annually in the United States. A principal purpose of the ATA is to support its member airlines by promoting airline safety and presenting common industry positions. Since its inception in 1936, the ATA has been involved in the development of federal and international law governing domestic and international air transportation.

The ATA has played a significant role in most federal governmental decisions regarding aviation, including the formulation of various federal aviation acts, the creation of the Civil Aeronautics Board, the creation of the air traffic control system, and airline deregulation. The ATA is uniquely qualified to assess the adverse impact of the decision below on the United States air transportation industry and the carefully balanced economic scheme interposed by Congress. The ATA's members are uniquely harmed

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[2] The ATA's members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and USAirways, Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

by the actions of states, like Hawaii, that choose to flaunt Congress' constitutional reservation of power to regulate and to protect this interstate industry.

SUMMARY OF ARGUMENT

The United States air transportation industry has evolved from its humble beginnings as a mail delivery system, into an effective, safe and timely means of interstate passenger transportation, and further into a nearly seamless globe-spanning air cargo and passenger network that sustains a robust national economy. This evolution, which in turn has facilitated the development and growth of other national industries and service sectors, has been the result of a delicate balance between federal and state and local regulatory powers over the structure of the national air transportation industry.

As part of this delicate balance, Congress explicitly prohibited state and local taxation of air transportation or the gross receipts therefrom. 49 U.S.C. § 40116(b). Nevertheless, the State of Hawaii persists in its refusal to acknowledge or to obey this restriction, by taxing the gross receipts of air cargo carriers.

The members of the air transportation industry have been forced to defend themselves against encroachments by the states on many other occasions. Unfortunately, the industry has not achieved consistent success in educating the states regarding the proper parameters of their taxing powers through the litigation process. In this case, the highest court of Hawaii—a court that has previously been reversed *on the identical question of federal preemption* by this Court—chose to interpret Congress' prohibition on taxation of gross receipts from air transportation

in a manner that evades Congressional intent to generate state tax revenues. In the face of such behavior, only this Court's intervention can effectively restore the delicate balance that Congress sought to introduce.

Moreover, this balance between federal and state prerogatives is critical to the resolution of this controversy. Permitting a state-tax obstacle course to crop up poses costs and other hazards to the air transport industry that were specifically contemplated and rejected by Congress when it originally enacted the federal preemption scheme at work in this case. This Court should clearly assert its authority to ensure that state action, as undertaken by Hawaii in this case, be rejected.

ARGUMENT

I. ONLY THIS COURT CAN CURB THE GROWING TREND OF STATES TO TAX THE AIRLINE INDUSTRY IN WAYS PROHIBITED BY CONGRESS

The United States air transportation industry has historically and consistently been a target of overreaching tax treatment by states and localities. There are several reasons for this unfortunate circumstance. The United States air transportation industry is inherently interstate. For this reason, the industry is an easy and politically advantageous target for taxation, both because these entities do not vote and because their customer bases likewise merely "pass through" the jurisdictions that subject them to tax directly or indirectly. Most critically to the controversy at hand, these jurisdictions seek creative theories to avoid Congress' affirmative exercise of its Commerce Clause powers to prohibit the imposition of specified taxes and fees.

In fact, Congress effected at least one specific amendment to former 49 U.S.C. § 1513 as a direct reaction to a state tax case, in order to reaffirm the statutory prohibition against targeted state taxation of air transportation. Section 1513(f), recodified as 49 U.S.C. § 40116(c), states: "A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft *only if the aircraft takes off or lands in the State or political subdivision as part of the flight.*" (Emphasis added.) This amendment is widely acknowledged to have been made in reaction to cases like *Republic Airlines, Inc. v. Wisconsin Dept. of Revenue*, Dane County Cir. Ct. No. 89CV2916 (Feb. 12, 1990), *rev'd*, 464 N.W.2d 62 (Ct. App. 1990), wherein the lower court upheld sales and use taxes on in-flight distribution and consumption of food and beverages that occurred on "overflights," *i.e.*, flights whereby planes passed over the state but did not either take off from or land in a facility in the state.

Nevertheless, despite Congress' reinforcement of the prohibition, states have continued to tax air transportation in violation of the federal preemption statute. The tax at issue in *Director of Taxation of Hawaii v. Lynden Air Freight, Inc.*, 968 P.2d 653 (Haw. 1998), is one of the most recent in a long line of such taxes targeted at interstate air transportation, and the decision below is one of many that unlawfully expand the scope of state and local taxing power. A very brief survey of representative decisions rendered within the past five years alone demonstrates that state and local taxing authorities continue to willfully trespass into territory that clearly has been prohibited to them.

In *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353 (Mo. 1995), the Department of Revenue insisted upon the inclusion of Delta's "bridge miles" (*i.e.*, miles Delta airplanes flew over Missouri without physically landing in or taking off from a facility in the State) in the numerator of the corporate income tax apportionment fraction, on the theory that the statute encompassed bridge miles within the term "mileage 'in the state.'" *Id.* at 355.[3] However, despite the Court's rejection of this theory, two other State revenue authorities have forced their supreme courts to revisit the identical issue. *Northwest Airlines, Inc. et al. v. Illinois Dept. of Revenue*, 692 N.E.2d 1264 (Ill. App. 1998), *leave to appeal denied*, 1998 Ill. LEXIS 979 (1998) (holding in favor of the taxpayer); *Commonwealth of Virginia, Dept. of Taxation v. Delta Air Lines, Inc.*, 1999 Va., Feb. 26, 1999) (holding in favor of the taxpayer).

The concerns of the air transportation industry are certainly not assuaged when one reviews recent encroachments by other states and localities upon territory specifically protected by Congress through 49 U.S.C. § 40116. Almost every type of state or local

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[3] Some tax professionals have referred to such a theory of tax jurisdiction as "groundhog nexus," *i.e.*, the nexus created by casting a shadow over the jurisdiction in question. However, this Court has clearly rejected such a notion as not constituting "substantial nexus" for Commerce Clause purposes. *Cf. Goldberg v. Sweet*, 488 U.S. 252, 263 (1989), *citing United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973) ("State has no nexus to tax an airplane based solely on its flight over the State"). Furthermore, the effect of including such mileage would be to impose an unfairly apportioned corporate income tax on the airline.

tax action that is specifically prohibited by this provision—not just the taxation of the gross receipts from air transportation—has in fact been taken or proposed against cargo or passenger air carriers.

In *Northwest Airlines, Inc. v. County of Hennepin*, 537 N.W.2d 488 (Mn. 1995) (holding in favor of the taxpayer), the county argued that state law denied a taxpayer relief in the form of equalization of property tax rates, where the median assessment ratio level was 90% or higher. Thus, it refused to equalize Northwest's 100% assessment ratio to that of other taxpayers (the median assessment ratio for those taxpayers was 98.3%). The county asserted this limitation on entitlement to relief in direct contravention of 49 U.S.C. § 1513(d) (recodified as 49 U.S.C. § 40116(d) during the pendency of this case), which prohibits discriminatory state taxation (including the discriminatory provision of tax relief) of air carrier property.

In a very recent decision addressing the applicability of the federal preemption scheme to a state tax, a Florida Circuit Court reviewed the application of Florida's intangible property tax to that portion of American Airlines' accounts receivable consisting of accounts solely derived from the sale of air transportation, in light of 49 U.S.C. § 40116(a). *American Airlines, Inc. v. State of Florida, Florida Dept. of Revenue*, No. 95-4165 (Cir. Ct., Oct 12, 1998). In response to the taxpayer's objection that a tax on American's sales of air transportation on credit "falls squarely within the prohibitions of the statute," the State of Florida creatively argued that the tax was imposed on an "account receivable" (not air transpor-

tation) and that it was a "property tax."[4] *Id.* The Court held for the airline.

There is no sign that this trend of infringement will abate, as states continue to consider taxes on airlines that clearly run afoul of the federal preemption provisions. For instance, in 1997 Florida's Agriculture Commissioner proposed that a $5 tax be imposed on every commercial airplane that lands in Florida, in order to fund a war on pests and diseases that impact agricultural products. The proposal would have diverted air transportation revenues to the States's general usage; Congress clearly views such diversionary tax schemes as "inequitable." Florida Agriculture Commissioner Calls for New Tax on Ships, Airlines," Tax Analysts Doc. 97-24764 (Sep. 1, 1997); *cf.* Petition, p. 23.

This Court has on occasion recognized the need to revisit issues that it previously addressed in the context of state and local taxation, in order to reinforce principles and prohibitions that might appear to have been enunciated adequately. The impetus for such reexamination generally has been the pleas of taxpayers for relief when they are denied protections to which

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[4] This argument bears an uncanny resemblance to the argument made by Hawaii in *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 13-14 (1983), where Hawaii sought to evade the imprimatur of Congress by styling its gross receipts tax as a property tax, *measured* by gross receipts. This Court's views on such manipulations could not have been more clear: "The manner in which the state legislature has described and categorized [this tax] cannot mask the fact that the purpose and effect of the provisions are to impose a levy upon the gross receipts of airlines." *Id* This case is currently on appeal to the Florida District Court of Appeals, First District, Docket No. 98-4024.

they are clearly entitled. *Cf., e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (revisiting *National Bellas Hess, Inc. v. Illinois Dept. of Revenue*, 386 U.S. 753 (1967), regarding the proper nexus threshold for sales/use tax purposes); *Reich v. Collins*, 513 U.S. 106 (1994) (insisting on the provision of a "clear and certain" remedy as prescribed in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990)). In such cases the Court has availed itself of the opportunity to augment the guidance available to tax administrators and taxpayers.

The decision below, and the trend it presages, presents a similarly compelling argument for this Court to clarify the parameters of federal preemption, in order to secure to the air transport industry the critical protections to which it is entitled by the Supremacy and Commerce Clauses. Indeed, this case presents a variation—poorly orchestrated—on an issue that the air transport industry thought this Court resolved in *Aloha Airlines* when it stated: "when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted." *Aloha Airlines*, 464 U.S. at 12.

Notwithstanding the Court's "plain language," the states continue their patchwork efforts to chip away at Section 40116. Where an "express congressional command" has been issued, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), and a state law is in conflict with that command, the state law is invalid. Congress has issued such a command with the enactment of 49 U.S.C. § 40116, and the Hawaii tax on

gross receipts derived from air transportation services must therefore fall.

II. THE RISKS OF SUCH ENCROACHMENT BY STATE AND LOCAL JURISDICTIONS CONSTITUTE THE VERY HAZARDS THAT CONGRESS SOUGHT TO PRECLUDE

The cumulative effect of piecemeal tax burdens that state and local jurisdictions place on the air transportation industry undermines the comprehensive, uniform, and efficient national air transportation system that Congress envisioned and sought to facilitate through its enactment of the preemption scheme at issue. 1973 U.S.C.C.A.N. at 1446-1450 (S. Rep. No. 93-12) ; *cf.* Petition, pp. 19-24. It has been the experience of the members of the ATA that such tax transgressions occur regularly and with increasing frequency.

The *Lynden* decision represents the very air transportation "tax creep" that Congress sought to eradicate. The costs to the industry, and hence to its commercial and individual/private customer bases, of this tax creep will be manifold. The costs of litigation, which industry members must regularly undertake to repel even the most transparent attempts to violate federal limitations on taxation of air transportation and air commerce, are already significant. The costs of compliance with tax schemes that rely on the allocation of gross receipts from air transportation to multiple state or local jurisdictions, or the costs of implementation and compliance with various other new taxes on air transportation, would likewise be extreme. The costs to implement new pricing structures that incorporate the tax variables that may or may not be uniform nationally will also take their toll.

Any shifting from the stern application of Congressional preemptive measures to all states—and particularly those that do not discern or respect the mandates of Congress or this Court the first time around—will give rise to the potential for other jurisdictions to read this decision as implicit encouragement to "join the fray." This Court has the unique ability to maintain the parameters of federal preemption *as required to protect this industry in the manner that Congress desired.*

CONCLUSION

For the reasons set forth above, the Air Transport Association of America respectfully requests that the Court grant a writ of certiorari and reverse the decision of the Hawaii Supreme Court.

Respectfully submitted,

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